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JOHN F. DAVIS, CLER

In the Supreme Court of the United States

OCTOBER TERM, 1967.

No. 139.

SOUTH SHORE PACKING CORPORATION,

Petitioner,

vs.

CITY OF VERMILION,

Respondent.

PETITION FOR REHEARING ON PETITION FOR A WRIT OF CERTIORARI.

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Petitioner prays that the Court review the order denying the Petitioner's petition for a Writ of Certiorari to the Supreme Court of Ohio entered October 9, 1967, and being petition no. 139 for the October term, 1967.

QUESTIONS PRESENTED.

All the questions presented in the original petition remain to be answered in view of the fact that no opinion was rendered by this Honorable Court. The specific questions which the Petitioner now requires to be answered relates to question no. I, as originally presented, bearing on the right of a municipal corporation to take the property of a private citizen without due process of law; that question no. II relates to the passage of a Resolution and Ordinance by which the City of Vermilion seeks to take the land of the Petitioner for sewage purposes when no sewage purpose was intended, when the Ordinance and Resolution were passed by City Council, and when as a

matter of fact, the City of Vermilion had already found a use for these properties other than for sewage purposes. Question no. III relates to the Constitutions of the United States of America and the State of Ohio forbidding the taking of private property of a citizen without due process, thereby depriving Petitioner of the equal protection of the laws and due process. Question no. IV relates to the proposition that the taking of private property by a municipal corporation is a judicial question as well as a legislative one.

The grounds for this petition for review which are confined to intervening circumstances of substantial or controlling effect, are that it has just come to the attention of the Petitioner that what the Peitioner has been previously saying as to the lack of necessity of Petitioner's property for sewage purposes, are now proven by the exhibits attached to this petition and which were not previously available, which indicate that the Respondent, City of Vermilion, itself, never did intend to use this particular land for a sewage disposal plant but instead, has usage relating to a marina, parking facilities for such marina, or for other purposes relating to a small boat harbor facility; so that the question here presented is whether or not the City of Vermilion may take the land of a private citizen who needs it for his own business, and by a false Ordinance or Resolution, take it for another business.

STATUTES.

Petitioner submits that the statutes involved in this petition are the same as contained in the petition for a Writ of Certiorari but that in addition thereto, Petitioner submits that Section 731.19 of the Revised Code of the State of Ohio so much of which is applicable herein, is necessary for a complete determination of the issues herein, which said portions read as follows:

> 731.19 (4226). "Subject and amendment of bylaws, ordinances, and resolutions. No ordinance, resolution, or bylaw shall contain more than one subject, which shall be clearly expressed in its title. No bylaw or ordinance, or section thereof, shall be revived or amended, unless the new bylaw or ordinance contains the entire bylaw, ordinance, or section revived or amended, and the bylaw, ordinance, or section so amended shall be repealed."

STATEMENT.

Petitioner adopts the statement contained in his original petition for a Writ of Certiorari but in addition thereto, makes the following supplemental statement.

The Petitioner has complained in all of the Courts which heard his case that the Respondent, the City of Vermilion, by Ordinance and Resolution, declared it necessary to take his land for sewage purposes. The evidence submitted by the City proved this not to be the case; that the City appeared to have some additional or ulterior purpose for wanting this particular land. The land in question abuts West River Road, in the City of Vermilion and then runs down a portion of the way to the Vermilion River.

The street portion is approximately 25 feet higher than the land area which the City desires for its sewage

plant and is therefore totally unusable for sewage purposes. It is hoped that the Court will again examine the maps produced by the City of Vermilion and contained in its engineering study designated as the joint exhibit I and A of the parties in the Court of Common Pleas of Erie County, Ohio; that a view of these map studies proves the Petitioner's proposition that the land of the Petitioner was not desired for sewage purposes; that the Petitioner attaches to this petition a photo picture of the proposed completed use of the land area both of the Petitioner's and the other lands going down to the Vermilion River, which picture indicates the real and only reason for the taking of such land, namely, the desire of the City of Vermilion to create a small boat harbor and to further create a marina and parking facilities for the use of the boat owners or operators. In addition thereto, the City Engineer, Mr. Ochse, on behalf of the City of Vermilion at a meeting of Rotary Club in the City of Vermilion on the 25th day of October, 1967, at which meeting he was the principal speaker, brought with him a plat prepared for the City of Vermilion and known as drawing number V-499 and which bears the name of R. E. Warner & Associates, a registered professional engineer, which is the original copy of a site plat, dated November 11, 1965, which is an exact duplicate of the photo picture hereinabove mentioned and totally illustrates that a huge portion of the land being taken by the City of Vermilion for sewage purposes is being diverted for docking and parking for a proposed small boat facility; that in view of the current lawsuit, the marina section has been carefully left out. Petitioner submits that at the meeting above mentioned, Mr. Ochse, who is the City Engineer for the City of Vermilion, made the statements contained in the affidavit which is submitted herewith as an exhibit. Peti-

tioner again refers to the testimony of Mr. Maloney, a registered engineer for the Petitioner:

> "Q. And nowhere in that program—I will ask you—is there anywhere in that program that the Plaintiff's lands are included in the proposed needs of the City of Vermilion, is that correct?
>
> A. I don't know what you mean by proposed needs. If you mean construction facilities on the property, the answer to that is it does not indicate that they need the property for any construction, no."

STATEMENT OF LAW.

Petitioner herein again relies on the statement of the law as contained in his petition for a Writ of Certiorari, but in addition thereto, makes the following supplemental statement of law:

> It is basic law that a municipality does not have the right to acquire real estate for investment purposes or for the purpose of joining with other individuals or entities in the furtherance of some business enterprise.

Ohio Jurisprudence 2nd, Vol. 19, Sec. 21, page 430, states, "Private property can be taken only for a public use."

Ohio Constitution, Article I, Section 19, states that private property shall ever be held inviolate but subservient to the public welfare. These words, which contain a fundamental tenet of our political heritage, express the delicate balance between the rights of our governed and the power of a free government * * * but, on the other hand, the constitutional guaranty of the right of private property would be hollow if all legislation enacted in the name of the public welfare were per se valid. To be truly in the public welfare within the meaning of Article I,

Section 19 of the Constitution of the State of Ohio, and thus superior to private property rights, any municipal legislation must be reasonable, not arbitrary, and must confer upon the public a benefit commensurate with its burden upon private property.

Ohio Jurisprudence 2nd, Vol. 19, Sec. 56, page 469, states the right to take private property which is necessary for public use is just as broad as that necessity and no broader. (See *Covington vs. Magruder,* 59 North Eastern 216.)

The Ohio Courts interpreting Ohio Code numbers 731.17 and 731.19 say strict compliance with these code numbers are mandatory and "carried by full yea vote" in the clerk's record does not comply therewith; the sections above numbered are the current sections of the Ohio Code relating to appropriation of real property by a municipality. The above quotation is taken from the case of *State, ex rel. Groghan vs. Rulon,* and is found in 84 Ohio Abstract on page 464.

In the earlier cases, the power to take by eminent domain was primarily legislative questions. In those cases, the power was held proper except in the absence of fraud, bad faith, or abuse of discretion. Note however, that in the *Vester* case, and in many other cases, the Supreme Court and the State of Ohio now says that these are judicial questions as well as legislative questions. So we may look to the whole scope of the appropriation and not merely the bad faith, etc. phrase. But even at that time, the Courts also held and this is from *Ohio Jurisprudence* 2nd, Vol. 19, Sec. 19, page 429, that but when the property sought to be taken is confessedly unnecessary for the purpose for which it is taken, the Courts may interfere. (See *Cincinnati vs. Haas,* 42 O. S., page 239.)

Ohio Jurisprudence 2nd, Vol. 39, Sec. 299, page 22 states the Code provides as to municipal corporations generally; that no Ordinance, Resolution, or Bylaw shall contain more than one subject which shall be clearly expressed in its title.

Ohio Jurisprudence 2nd, Vol. 39, Sec. 304, page 34, REASONABLENESS. It is a fundamental principle that a municipal Ordinance must be reasonable and may not be arbitrary, discriminatory, or capricious. (See *Cincinnati vs. Correll*, 49 N. E. 2nd 412.)

Ohio Jurisprudence 2nd, Vol. 39, Sec. 307, page 39; in speaking of good faith and motives, states, "* * * But, an Ordinance enacted under the color of authority conferred for a specific purpose, in order to accomplish an ulterior object, has been held to be ineffective insofar as it relates to such ulterior object or purpose." (See *Carpenter vs. Cincinnati Traction Co.*, 106 N. E. 1049.)

In view of the Ohio statutes above mentioned, and the Constitutional provisions herein indicated, and in further view of the fact that the evidence included in this petition clearly indicates other purposes not mentioned in the Ordinance and Resolution; that such Ordinance and Resolution were void insofar as they affected the property of the Petitioner or the additional usages which they had planned for it; that nowhere does there appear any Ordinance or Resolution indicating the City's desire to use the property of the Petitioner for private purposes such as a parking lot or a marina. All the evidence on the other hand points to the proposition that only for these non-municipal needs or desires does the City of Vermilion now seek to take the property of the Petitioner. The Respondent, City of Vermilion, does not say anywhere that they have passed additional Ordinances or Resolutions to take the property of the Petitioner for a parking lot or a ma-

rina, nor would such a Resolution or Ordinance be valid since it is not a taking for a governmental purpose or for the public welfare, but is a private business enterprise which the City of Vermilion appears desirous of engaging in.

CONCLUSION.

For the foregoing reasons, this petition for a review of the petition for a Writ of Certiorari should be granted.

Respectfully submitted,

JOHN B. OTERO,
WILLIAM M. BARRETT,
OLIVER TRUE,
Counsel for Petitioner.

Certificate of Counsel.

The undersigned attorney for petitioner hereby certifies that this certificate is made pursuant to Rule 58 of the Rules of the Supreme Court of the United States; that the petition for rehearing is presented to the Court in good faith and not for delay; and that the issues to be resolved are real issues and in a substantial way affect the property of the petitioner herein.

WILLIAM M. BARRETT,
Attorney for Petitioner.

EXHIBIT 1.

Affidavit of Stratton L. Appleman dated October 27, 1967.

Stratton L. Appleman, being first duly sworn, deposes and says that he is the President of the South Shore Packing Corporation.

Affiant further says that he is a member of the Rotary Club in Vermilion, Ohio; that as such member, he attended a meeting of Rotary on the 25th day of October, 1967, at which time the speaker was Mr. Ochse, who is the city engineer for the City of Vermilion and who is also a partner in R. E. Warner and Associates, who are the engineers hired by the City of Vermilion to do the engineering and allied work in connection with the sewage disposal plant and its location, now the subject matter of the within action.

Affiant further says that the South Shore Packing Corporation is the owner of four (4) lots of land which the City of Vermilion seeks to appropriate; that the gist of Mr. Ochse's remark was that the City of Vermilion would add additional parking facilities for its small boat facilities on the property of the South Shore Packing Corporation, if and when it would acquire title thereto.

Affiant further says that in the original Resolution and Ordinance, to acquire such land, the verbiage of the Ordinance and Resolution were as follows:

RESOLUTION No. 65R-1

A resolution declaring the intention of the Council of the City of Vermilion, Ohio, to appropriate for municipal purposes as a part of the site of a proposed new municipal sewage disposal plant the fee simple title to certain real estate situated in the City of Vermilion, Ohio, and declaring an emergency.

Be it resolved by the Council of the City of Vermilion, State of Ohio:

Section 1. That the Council of the City of Vermilion, Ohio, hereby declares its intention to appropriate the fee simple title to the following described real estate:

Situated in the City of Vermilion, State of Ohio and County of Erie and known as being lots numbers 419, 420, 421, and 422 of Block 45 of the old town plat of Vermilion Village and bounded and described as follows:

Beginning at the westerly corner of lot 423 of Block 45, said corner being in the easterly line of Water Street also known as West River Road:

Thence N. 47°50′ E. along the northwesterly line of lot 423 a distance of about 89 feet to the northerly corner thereof:

Thence bearing about N. 32° W. along the northeasterly lines of lots 419 to 422 inclusive a distance of about 240 feet to the southerly line of Ohio Street, also known as being the north corner of lot 419:

Thence S. 47°50′ W. along the south line of Ohio Street a distance of about 113 feet to the easterly line of Water Street:

Thence S. 42°10′ E. along the easterly line of Water Street a distance of about 240 feet to the place of beginning, and containing within said bounds .56 of an acre, be the same more or less, but subject to all legal highways.

Section 2. That the real estate is being appropriated for a municipal purpose, the purpose being as a portion of the site of a new municipal sewage disposal plant, and that the appropriation of the real estate is proper.

Section 3. That this resolution is hereby declared to be an emergency measure necessary for the immediate preservation of the public peace, health and safety of the city, the emergency being the immediate necessity to ap-

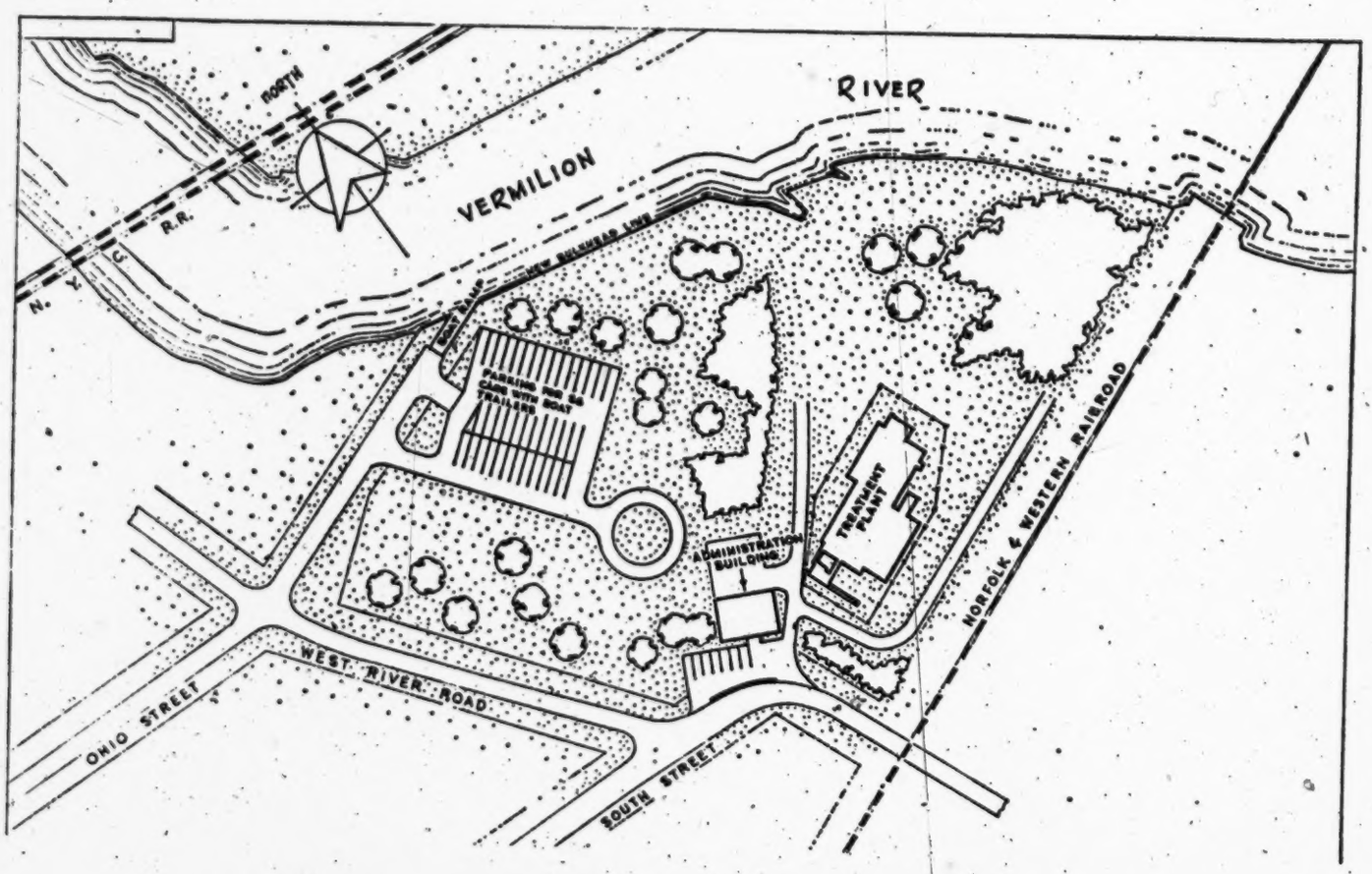
propriate this real estate in order to provide for the erection of a new disposal plant and thereby to protect the health of the inhabitants of the city and this resolution shall go into full force and effect from and immediately after its passage and its approval by the Mayor.

s/ STRATTON L. APPLEMAN

Sworn to and subscribed before me this 27th day of October, 1967.

s/ JOSEPH RADER
Notary Public, State of Ohio,
Lifetime Comm.

(L.S.)



Federal Grant Received

Just after we had gone to press last week, we received word from Congressman Charles A. Mosher's office that the grant of $321,390 from the Federal Water Pollution Control Board to aid in the construction of the city's new sewage disposal had been made.

Checking with Mayor Louis Rauh, Jr., we learned the grant amounted to 30 percent of the cost of building and equipping the plant, which will cost $1,070,320. The grant will be administered by the Ohio Water Pollution Board of Cincinnati.

The total cost of the project is estimated to be $1,365,000 which includes trunk line sewers, conversion of existing disposal plants to pumping stations, and installation of new sewers where none exist today. The balance of the plant cost will be paid by mortgage revenue bonds, and general revenue bonds, except in the cases where new sewers are being installed where none exist today. In this latter case the cost will be paid by assessment.

Construction is expected to begin with ground breaking within 90 days. It has taken four years to bring this project along. First plans had to be drawn up and approved, providing both primary and secondary treatment. These plans had to secure the approval of both the state and federal control agencies. Then the federal grant had to be included in the Federal Budget with the House Appropriations Committee's approval. Mayor Rauh journeyed to Washington to appear with Congressman Mosher before this Committee during the hearings.

The plant will be located on the river, with the treatment plant along the N & W Railroad rightaway and the administration building at the foot of South Street. Shown also on the above drawing is the proposed boat ramp and parking at the foot of Ohio Street. This project is seeking supporting funds from the Ohio Department of Natural Resources. The Ohio Division of Wildlife and Recreation is expected to set aside some of the funds collected from boat licenses and taxes on gasoline used by boats to help finance this project.

This photograph is taken from the *Vermilion Photojournal*, December 15, 1966, Volume 8, No. 15, Page 2.